



U.S. Department of Justice

Office of Justice Programs

Office for Civil Rights

Washington, D.C. 20531

CERTIFIED RETURN RECEIPT REQUESTED

December 10, 2009

Keith Horn, Attorney Sr.
Lexington-Fayette Urban County Government
Department of Law
P.O. Box 34028
Lexington, KY 40588

Re: Compliance Review of the Kentucky Administrative Office of the Courts and
Lexington-Fayette Urban County Government, Community Alternative Program
(09-OCR-0213)

Dear Mr. Horn:

I am writing to summarize the findings of the compliance review of language services at the Lexington-Fayette Urban County Government, Department of Public Safety (DPS) conducted by the Office for Civil Rights (OCR), Office of Justice Programs, U.S. Department of Justice. The OCR would like to thank you for assisting OCR attorney Shelley Langguth during her July 30, 2009, onsite review.

In my letter dated March 6, 2009, I wrote to the Commissioner of the DPS Tim Bennett to inform him that the OCR had selected the DPS for a compliance review under Title VI of the Civil Rights Act of 1964 (Title VI) and the Omnibus Crime Control and Safe Streets Act of 1968 (Safe Streets Act) and their implementing regulations. As I noted at that time, the OCR limited the scope of the compliance review to the DPS' provision of services to people with limited English proficiency (LEP) who participate in drug testing conducted by the DPS' Community Alternative Program (CAP). A LEP person is an individual whose primary language is not English and who has a limited ability to read, write, speak, or understand English. The OCR initiated this review in response to an administrative complaint filed with our office alleging that the CAP discriminated against a Spanish-speaking LEP individual who was ordered by the Fayette Circuit Family Court to undergo drug testing at the CAP. Specifically, the complaint alleges that the LEP individual called the CAP automated phone answering system in May 2008 to listen to the recorded message to determine when the individual must come in for drug testing, and that the recorded message was in English. The complaint states that the LEP individual was not able to

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understand the recorded message, and as a result, the LEP individual missed several required drug tests. The complaint further alleges that the Order for Drug Testing at the Community Alternative Program that the Fayette Circuit Family Court provided to the LEP individual was in English.

In June of 2002, the U.S. Department of Justice published guidance for its financial aid recipients on taking reasonable steps to provide meaningful access to programs and activities for LEP persons in accordance with Title VI and the Safe Streets Act. See Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (2002) [hereinafter DOJ Guidance]. According to the DOJ guidance, a recipient's obligation to take reasonable steps to ensure meaningful access to its programs and activities for LEP persons requires an assessment that balances four factors: (1) the number or proportion of LEP persons that are the likely beneficiaries of a recipient's services; (2) the frequency with which LEP persons come into contact with the recipient's programs or activities; (3) the nature and importance of the program, activity, or service provided; and (4) the resources available to the recipient and the related costs. 67 Fed. Reg. 41459-61.

Using the technical assistance standards in the DOJ Guidance, the OCR gathered information from the DPS on its policies and procedures for providing services to LEP persons participating in drug testing at the CAP. Based on the documentation that the DPS submitted and on the information that we gathered during our onsite visit, which included interviews with officials and staff from the DPS, the OCR sent you a draft Letter of Findings on November 2, 2009, in accordance with 28 C.F.R. §§ 42.107(d)(2) and .206(e). During a November 18, 2009, telephone conversation, you stated that the DPS does not have any factual corrections to the draft Letter of Findings.

In regard to the limited scope of our review, the OCR concludes that the DPS is taking steps to provide LEP persons with meaningful access to the drug testing services provided at the CAP. However, the DPS should take further action to ensure that it is meeting its obligations under Title VI and the Safe Streets Act.

Section I of this Letter of Findings contains a summary of the policies and procedures that the DPS currently has in place to provide language services to LEP persons receiving drug testing services from the CAP. In Section II, the OCR provides the DPS with recommendations based on the DOJ Guidance for how the DPS can improve its services to LEP persons participating in drug testing at the CAP.

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I. Overview of Existing Language Access Services

The CAP is operated by the DPS' Division of Community Corrections, Bureau of Programs, Services, and Community Placement. The CAP conducts drug testing of individuals who are referred by agencies in Fayette County and adjacent counties and by the Fayette County courts, including the Fayette Circuit Family Court. The CAP also provides sentencing alternatives to individuals sentenced by the Fayette County courts by offering Electronic Monitoring and Day Reporting Programs.

According to the U.S. Census Bureau, Fayette County had a total population of 251,803 individuals age five and older in 2006; of this group, 25,257 (10%) individuals spoke languages other than English, including 12,482 (5%) who spoke English less than "very well" and are LEP. U.S. Census Bureau, American FactFinder, 2006 American Community Survey, Fayette County, Kentucky, B16004 Age by Language Spoken at Home by Ability to Speak English for the Population 5 Years and Over at www.census.gov. Specifically, of the Fayette County residents age five and older, 12,725 (5%) residents spoke Spanish, with 6,725 speaking English less than very well; 4,547 (1.8%) residents spoke other Indo-European languages, with 1,492 speaking English less than very well; 5,609 (2.2%) residents spoke Asian and Pacific Island languages, with 3,047 speaking English less than very well; and 2,376 (.9%) residents spoke other languages, with 1,218 speaking English less than very well.

In the DPS' response to the OCR's data request, it said that it does not track the number of LEP persons who come to the CAP for drug testing. The DPS also said that currently it does not have any written policy or operational plan in place regarding the provision of language assistance services to individuals being served by the CAP. According to the DPS' data response, if a LEP individual comes to the CAP for drug testing, CAP employees use the telephonic interpretation service Language Line to communicate with the LEP individual or relies on a Spanish-speaking employee in the Bureau of Programs, Services, and Community Placement who is a certified interpreter. The DPS explained that this employee, Corporal Rodriguez, provides interpretation services throughout the Bureau of Programs, Services, and Community Placement, and that she obtained a certification in interpretation from the Kentucky Administrative Office of the Courts in July 2008. The DPS also said that beginning in July 2008 the CAP's automated phone answering system, which provides callers with information on when they are required to come in for drug testing, allows a caller to listen to the information in either English or Spanish. The OCR confirmed that the CAP's automated phone answering system currently provides callers with the option of listening to the messages in either English or Spanish. According to the DPS' data response, CAP employees have relied on friends and family members of LEP individuals to provide language assistance on a few occasions.

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During the OCR's onsite visit we spoke with DPS staff responsible for overseeing the CAP's drug testing program, including the manager of the Bureau of Programs, Services, and Community Placement and the sergeant who serves as the onsite supervisor of the CAP. The DPS staff told the OCR that the CAP does not frequently encounter individuals who are LEP, and that many LEP individuals who do come in for drug testing bring with them one of the interpreters provided by a local court. The DPS staff explained that CAP employees are aware of Corporal Rodriguez's ability to provide language assistance through word-of-mouth, and that employees can contact her over the phone or by email to request language assistance. During an interview with the OCR, Corporal Rodriguez said that CAP employees contact her to provide interpretation over the phone approximately once or twice per week.

While at the CAP, the OCR observed a separate room that contained telephones where CAP employees may contact Language Line to obtain assistance for LEP individuals undergoing drug testing. The OCR also observed instructions near the telephones on how to access and use Language Line, along with a document from Language Line that allows a LEP individual to point to the language that he or she speaks. In the DPS' data response, it provided the OCR with a copy of a document by the Division of Community Corrections entitled "Protocol for Using the Language Line." This Protocol explains the procedures for using Language Line and instructs CAP employees to use Language Line to communicate with LEP individuals under the following circumstances: providing information on the CAP's services and programs; explaining procedures for completing forms; answering questions regarding CAP; answering complaints regarding CAP; gaining compliance from program participants; and any other type of communication with LEP persons. Following the OCR's onsite visit, DPS staff clarified that the DPS provided CAP employees with this Protocol when the CAP began using Language Line, and that CAP supervisors redistributed the Protocol to all CAP employees in the spring of 2009 and also discuss the Protocol during new employee orientation.

The DPS provided the OCR with copies of the monthly invoices from Language Line covering the period of January through December 2008 which list the number of times that Language Line provided interpretation and the languages involved; however, these invoices reflect the telephonic interpretation that Language Line provided to the entire Division of Community Corrections and not just the CAP. According to these invoices, Language Line provided telephonic interpretation for Division of Community Corrections employees 272 times during 2008, with 249 calls (92%) involving interpretation in Spanish. Other languages include Mandarin (eleven calls), Bosnian (three calls), Russian (two calls), and Arabic (two calls).

During the OCR's onsite visit, the OCR interviewed three officers who work at the CAP. One of these employees reported contacting Officer Rodriguez for language assistance when a LEP individual came in for drug testing and one officer reported using Language Line for this

purpose. One officer said that he has never encountered any LEP individuals participating in drug testing. The officers who have encountered LEP individuals said that they primarily encounter LEP individuals who speak Spanish, and that LEP individuals will often bring a friend or family member with them to provide interpretation. The officers said that they use friends or family members to communicate with LEP persons on issues such as requesting identification, clarifying the payment for drug testing, and inquiring who referred the LEP person to the CAP. One officer also told the OCR that on a few occasions a LEP individual has brought a court interpreter with them to provide interpretation. One officer recommended that the CAP hire an employee who is fluent in Spanish in order to provide more effective services to LEP individuals.

As for written materials associated with the CAP's drug testing program, the DPS provided the OCR with the CAP's Drug Testing Rules and Requirements which all drug testing participants are required to read and sign; the CAP has this document available in English and Spanish. The DPS also provided the OCR with English and Spanish versions of forms that it provides to external agencies such as the Fayette Circuit Family Court to refer individuals to the CAP. The DPS staff told the OCR that Corporal Rodriguez translated all of these forms into Spanish.

As discussed on page 1 of this Letter of Findings, the OCR received a complaint alleging that a LEP individual received from the Fayette Circuit Family Court an Order for Drug Testing at the Community Alternative Program that was in English. The complainant provided the OCR with this form, which appears to be a form developed by the Fayette Circuit Family Court and not the referral form developed by the DPS that is referenced above.

While at the CAP office, the OCR observed a sign entitled "CAP Drug Testing and Electronic Monitoring Office Guidelines" that is posted in English and in Spanish near the entry to the CAP office. This sign explains the rules and procedures of the drug testing program and instructs individuals to call a certain number and ask to speak to a supervisor for any questions or complaints relating to CAP. The OCR also observed instructions on completing a urine sample in English and in Spanish posted on the bathroom door and right outside the bathroom.

As for training of CAP employees on how to provide assistance to LEP individuals, as discussed previously in this Letter of Findings, the DPS has provided CAP employees with a written Protocol for Using the Language Line and also discusses this Protocol during new employee orientation. The CAP employees with whom the OCR spoke reported receiving training from supervisors on the use of Language Line along with written information on Language Line. Subsequent to the OCR's onsite visit, DPS staff said that the DPS will now be conducting mandatory annual training on the use of Language Line for CAP employees.

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In the DPS' data response, it said that complaints from the general public against the CAP are handled by the sergeant or captain within CAP or the manager of the Bureau of Programs, Services, and Community Corrections, and that the CAP could also forward a complaint to the Internal Affairs Bureau of the Division of Community Corrections. As discussed above, the CAP Drug Testing and Electronic Monitoring Office Guidelines instructs participants to call the CAP and ask to speak to a supervisor for any complaints against CAP; this document is posted in English and in Spanish. According to the DPS' data response, the DPS would use Language Line or Corporal Rodriguez to communicate with LEP individuals complaining of discrimination by the CAP.

II. Recommendations for Improving Services to LEP Individuals Participating in the CAP's Drug Testing Program

The DPS is currently taking steps to ensure that LEP individuals are receiving meaningful access to the CAP's drug testing services, such as by using Language Line and a certified bilingual employee to communicate with LEP individuals, ensuring that the CAP's automated telephone system now provides information in both English and Spanish, translating the Drug Testing Rules and Requirements into Spanish, and posting numerous signs at the CAP office in Spanish. However, the DPS should build on these steps to provide more effective language assistance services to LEP individuals participating in the CAP's drug testing program. As an initial matter, the DPS should expand on the existing Protocol for Using the Language Line to develop a comprehensive written plan or operational order addressing the procedures that CAP employees should follow when they encounter a LEP participant in the CAP's drug testing program. This document should explain that it is the policy of the DPS to provide LEP individuals participating in the CAP's drug testing program with effective language assistance to ensure meaningful access to the CAP's drug testing services. The document should address how CAP employees should provide language services to LEP individuals in a variety of contexts such as performing drug testing services, providing information and responding to questions, responding to telephone calls, and handling complaints. The document should clearly explain the available options for providing language assistance services, such as using Language Line or Corporal Rodriguez to provide interpretation, and should set forth the procedures that employees should follow in using each available option. The document should instruct employees to use family members, friends, or bystanders to interpret only when communicating general, non-sensitive information (e.g., requesting identification, asking what agency referred the individual to the CAP) and when using such parties would not raise concerns of privacy, confidentiality, or conflict of interest.

Once the DPS has established and formalized its written plan, it should immediately train all employees of the CAP's drug testing program on the plan to ensure that all employees are aware

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of the proper procedures for providing language assistance services. Following this initial training, the DPS should follow through on its stated intention to conduct annual training sessions for CAP employees on the use of Language Line along with other available language assistance resources.

When the DPS uses bilingual employees such as Officer Rodriguez to translate documents associated with the CAP's drug testing program, it should implement quality control measures to ensure the accuracy of translated materials and to make sure that all of the information is being conveyed to LEP persons. The accuracy of translated materials could be ensured by having a second, independent translator, such as an officer, a professor from a local university, or a community member who has demonstrated competency in translation, to verify the work of the primary translator. The DPS may also wish to use "back translation," where the primary translator can translate the document, and a second, independent translator could translate it back into English to ensure that the appropriate meaning has been conveyed.

Currently, the DPS does not track its encounters with LEP individuals participating in the CAP's drug testing program. The DPS should develop procedures for recording and gathering data on LEP individuals who participate or inquire about the CAP's drug testing program, such as by modifying existing forms or by creating a new form. However the DPS chooses to track these encounters, it should be sure to include information on the language spoken by the LEP person and the DPS' response to the need for language assistance. The DPS should review this data on a periodic basis to determine how frequently LEP individuals interact with the CAP's drug testing program and the languages that these individuals are speaking. The DPS should then use this data to analyze whether it has a sufficient number of bilingual employees available to provide language assistance to LEP individuals participating in drug testing at the CAP.

Conclusion

This letter serves as notice that OCR has found that the DPS appears to be taking steps to provide meaningful access to its services to LEP persons interacting with the CAP's drug testing program. However, the DPS should build on these steps to ensure compliance with Title VI. On request, the OCR is available to provide technical assistance to the DPS in implementing our recommendations. Upon receipt of this letter, we request that a responsible DPS official contact Attorney Advisor Shelley Langguth to discuss the DPS' timeframe for implementing the OCR's recommendations.

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Thank you for your cooperation and the assistance of your staff throughout the compliance review process. If you have any questions, please contact Ms. Langguth at (202) 305-2353.

Sincerely,
/s/

Michael L. Alston
Director

cc: Commissioner Tim Bennett
Department of Public Safety

Director Ron Bishop
Department of Public Safety, Division of Community Corrections